No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

PLAINTIFF/RESPONDENTS' ANSWER TO THE AMICUS BRIEF OF THE "INSTITUTE FOR JUSTICE"

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*Note: This case was brought by the McCleary family, the Venema family, and the Network for Excellence in Washington Schools ("**http://www.waschoolexcellence.org/about_us/news_members**" provides the current list of that plaintiff organization's over 360 member entities). The following refers to them as "plaintiffs" (and to the State as "defendant") to avoid confusion between the "Petitioners" below who are now "Respondents" on appeal and the "Respondent" below that is now the "Petitioner" on appeal. Cf. RAP 10.4(e).*

I. INTRODUCTION

The "Institute for Justice" ("Institute") describes itself as nationwide organization that defends "parental choice" programs in other States which (apparently) use State money to help fund private schools – State funding which the Institute asserts cannot lawfully be withheld from religious schools.[1] The Institute's amicus brief accordingly presents arguments that focus on:

- the legality and merit of the various "parental choice" programs the Institute has defended in other States.
- constitutional language from another state that was removed long ago and is irrelevant to Washington's clear, unique and unchanged constitutional duty in Article IX, §1.

This Answer provides plaintiffs' position on how these new arguments raised in the Institute's amicus brief relates to the 5 issues currently before this Court.

[1] *The Institute expressly notes its disagreement with the position that a State can constitutionally restrict its funding of private schools to non-religious schools. See Institute's amicus brief at pages 7-8, footnote 3.*

As noted in this case's prior briefing, the 5 issues for review raised in the State's and the plaintiffs' briefing can be summarized as follows:

1. State's first issue ("education"): Did the trial court err in ruling that the term "education" in Article IX, §1 has the meaning that it held it has?

2. State's second issue (actual vs. fictional cost): Did the trial court err in ruling that Article IX, §1 requires the State to base its funding on actual costs *(instead of the existing funding formulas)*?

3. State's third issue ("stable & dependable"): Did the trial court err in ruling that Article IX, §1 requires the State to provide "stable and dependable State funding" *(instead of State funding from "regular and dependable tax sources")*?

4. State's fourth issue (State's failure): Did the evidence at trial support the trial court's ruling that the State is currently failing to comply with Article IX, §1?

5. Plaintiffs' issue (compliance deadline): Did the trial court err in ruling that the legislature can merely proceed with real and measurable "progress" to comply with the court's ruling *(instead of setting a hard compliance deadline)*?[2]

As the following pages explain, unlike the other three amicus briefs filed in this appeal, the Institute's brief does not relate to any of the issues before this Court.

For example, although the Institute's amicus brief uses the word "education", the Institute's brief does not address the trial court's ruling on the substantive meaning of the term "education" in Article IX, §1 (State's first issue). As another example, the Institute's amicus brief uses the

[2] *See Plaintiffs' September 20 Brief* (Plaintiff/Respondents' Brief [with Errata] *dated September 20, 2010) at pages 2-6.*

"paramount duty" phrase in Article IX, §1, but the Institute's brief does not address the evidence at trial supporting the trial court's ruling that the State is currently failing to comply with Article IX, §1 (State's fourth issue).

Instead, as explained below, the Institute's brief seeks an advisory opinion from this Court concerning an issue that is **not** on appeal, and was **not** presented, tried, or ruled upon in the underlying trial court proceeding.

II. DISCUSSION

A. The Institute requests an advisory opinion on an issue not before this Court

The legality of any particular "parental choice" program under Washington law could be a very interesting issue for this Court to address if this Court reviews a case involving that issue.

But this is not that case. As the Institute's own submissions acknowledge, the hypothetical "parental choice" program whose legality the Institute wants this Court to now render an advisory opinion about has not been raised or addressed by any of the parties in this case.[3] Not surprisingly, the legality or propriety of "parental choice" programs therefore was not ruled upon by the trial court either.

[3] *Institute's Motion For Leave To File Amicus Curiae Brief at page 4.*

For example, one of the articles the Institute alleges supports the ruling it seeks is an article written by Robert M. Costrell on some program in Milwaukee.[4] That same Robert M. Costrell was one of the State's expert witnesses in this case.[5] Even though the defendant State had that witness on the stand at trial, the defendant State did not use him to raise any issue concerning the legality or propriety of "parental choice" programs under Washington law, nor did he know anything about Washington's schools or our Washington Constitution.[6]

The State simply did not make any claims concerning the legality or propriety of "parental choice" programs under Washington law – either at trial or on appeal. The legality or propriety of "parental choice" programs under Washington law was not presented, tried, or ruled upon in the underlying trial court proceeding, and is not on appeal in this review.

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[4] *Institute's amicus brief at page 19, lines 17-18.*

[5] *See CP 2946-47(Exhibit A to the trial court's decision, listing Robert Costrell as one of the 55 trial court witnesses).*

[6] *See RP 4636:6-19 (Costrell testifying that he had no definition of basic education, didn't know what the meaning of basic education would be in Washington, and didn't have a definition of an inadequate education); RP 4637:25-4638:3 (Costrell had no opinion about whether public school children in Washington are getting an adequate education); RP 4640:10-17 (Costrell had no opinion about whether Washington is underfunding basic education or whether Washington has violated its constitutional duty); RP 4633:20-22 (Costrell did not analyze any funding formulas); RP 4631:12-4633:6 (Costrell has no experience as a superintendent, K-12 teacher, principal or administrator and has no personal experience with Washington public schools).*

B. "Parental Choice" programs do not cure the State's Constitutional violation

The Institute seeks to divert this Court's attention from the five previously described issues on appeal. The Institute would like this Court to focus on anecdotal references to "parental choice" programs in other States.

There already have been thirty-three years of delay by the State since this Court's *Seattle School District* decision affirming the importance of enforcing the State's Constitutional duty under Article IX, §1.[7] That is long enough. The trial in this case established the State's present, ongoing failure to comply with its paramount Constitutional duty to amply fund its public schools to provide all children the education mandated by Article IX, §1. The trial court did not mandate the specific ***means*** by which the State must comply with its Constitutional duty. The Institute nonetheless suggests that "parental choice" should be one of those means.

There was no evidence presented at trial that the State is effectively using "parental choice" alternatives now. And none of the out-of-state references cited by the Institute concern studies about this State and the current educational condition of Washington students. What

[7] *Seattle School District v. State, 90 Wn.2d 476, 500 (1978)(finding that Article IX, Section of the Washington State Constitution is not merely a statement of moral principle, but rather a mandatory and judicially enforceable affirmative duty).*

Milwaukee may have done with some "parental choice" program in 1998 is not a basis for this Court to overlook the substantial evidence presented and considered at trial in this case regarding our State's inaction in the face of numerous studies over the years, and the State's ongoing failure to meet its Constitutional duty under Article IX, §1.[8]

Moreover, even though the plaintiffs in this case do not have years of prior briefing on "parental choice" to draw upon as the Institute does, it is evident from material located on short notice that "parental choice" programs often have serious flaws and questionable results.[9] The

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[8] *See, e.g. CP 2939 (Trial Court's Findings and Conclusions "FOF/COL" at ¶ 261: "Since 1990 alone, the Respondent State has conducted over 100 K-12 education finance studies."); CP 5672:23-5673:8 (Rep. Anderson noting 25 years and 109 previously performed studies and initiatives in this State; "There's not a year that goes by that there are not multiple investigations into some aspects, some large, some minute [of K-12 education]).*"

[9] *Frederick M. Hess, Fulfilling the Promise of School Choice, American Enterprise Institute for Public Policy Research, No. 5 at 1, http://www.aei.org/outlook/28679 (2008) (evaluating the Milwaukee Parental Choice Program in 2008 and concluding that "it is clear by now that voucher programs and charter school laws have failed to live up to their billing"); Julie Berry Cullen, Brian A. Jacob and Steven D. Levitt, The Impact of School Choice on Student Outcomes: An Analysis of the Chicago Public Schools, 89 J. Public Economics, 729, 754-55 (2005)(evaluating the impact of school choice on student outcomes in the context of open enrollment within the Chicago public schools, and concluding that other than for students who select career academies, the observed benefits are likely spurious and that "systemic choice within a public school district does not seem to benefit those who participate"); Jim Waring, Educational Vouchers: The Case for Public Choice Reconsidered, 16 Public Budgeting & Finance 63-73 (1996) (noting that voucher programs for private schools have significant hidden costs that could compromise any efficiency); Rodney T. Ogawa and Jo Sargent Dutton, Parental Choice in Education: Examining the Underlying Assumptions, Urban Education, Vol. 29, No. 3, 270, 292 (1994)(noting that while evidence on parental choice programs is generally incomplete, inconclusive and "terribly uneven", it sheds more light on the type of parents who are most likely to exercise choice: they tend to be better educated and already involved in their children's education); Center for Education Outcomes, Charter School Performance in 16 States, CREDO at 1, http://credo.stanford.edu*

Institute's hopes and claims about "parental choice" programs do not in any way diminish the State's violation today. Nor do such hopes or claims relate to the five issues before this Court in this case.

C. The limited education dollars spent in Washington State are used effectively

Simply stated, abstract assertions and anecdotes contending that parental choice programs' may save money in other States are irrelevant to this State and this appeal. The trial confirmed that the limited — and shrinking — dollars spent on educating children in this State are used effectively. There was no evidence or finding at trial that Washington's public school system is inefficient or wasteful. To the contrary, the evidence was that the State's school districts need and utilize every dollar provided, and while there have been some achievements despite the

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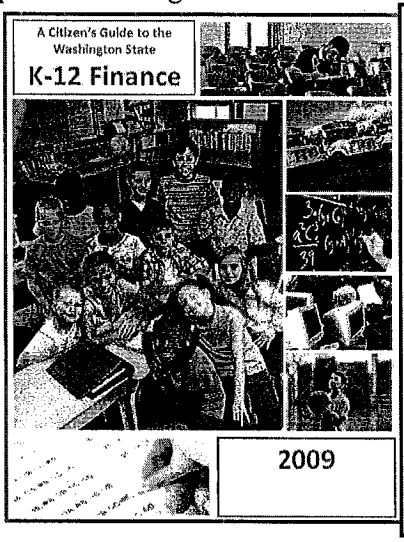
(2009)(concluding that only 17% of charter schools in other states provided superior education opportunities for their students, nearly half had results no different from the local public school options, and 37% delivered "learning results that are significantly worse than their student[s] would have realized had they remained in traditional public schools.");Ullik Rouk, Vouchers: Yea or Nay, Insights on Education Policy, Practice and Research, Southwest Educational Development Laboratory, No. 12 at 12-13 (2000)(concluding that voucher programs can bring high costs to public school systems for administering and evaluating the voucher program, verifying eligibility, record keeping, and developing information systems so parents can make choices; that with additional transportation and administrative costs, Cleveland's voucher program resulted in a total cost increase of more than $10 million, and that "the body of research about the impact of publicly funded voucher programs on student achievement is too small to be conclusive" with "little statistically significant difference between students with vouchers and those without.").

State's low level of funding, the funds provided by the State are inadequate to allow all kids to learn to State standards.[10]

D. Washington's paramount duty has never changed.

The Institute's allusion to constitutional language from other States is also misplaced and irrelevant. The trial court in this case concluded that "the treatment of education in the Washington Constitution is singular among states" and that "Washington has the strongest constitutional mandate in the nation to provide for education."[11] The State itself emphasizes in its own published material — its Citizen's Guide explaining public school finance to Washington citizens — that Article IX, § 1 is unique to Washington:[12]



What does the Washington State Constitution say about K-12 public school funding?

"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

-Washington Constitution, article IX, section 1

This constitutional provision is unique to Washington. While other states have constitutional provisions related to education, no other state makes K-12 education the "paramount duty" of the state.

[10] *See, e.g., RP 3137:6-9 (State expert Eric Hanushek acknowledging that all kids in Washington are not getting the knowledge and the skills needed to meet the Washington State standards).*

[11] *CP 2872 (Introduction to FOF/COL); CP 2903 (FOF/COL ¶ 146).*

[12] *Tr.Ex. 192, cover and p.2.*

Accordingly, the trial court held that no other State Constitution imposes a higher education duty upon the State, and the education duty in Article IX, §1 is the only duty our State Constitution identifies as the State's paramount duty:

> Washington law recognizes that no other State Constitution imposes a higher education duty upon the State than Article IX, §1 of the Washington State Constitution does. The Washington Supreme Court has held that the education duty mandated by Article IX, §1 "is unique among State constitutions", and that "No other State has placed the common school on so high a pedestal." *Seattle School District v. State*, 90 Wn.2d at 498 & 510-511.[13]

The Institute's reference to "**the** paramount duty" language from Florida's Constitution of 1868 shouldn't mislead this Court — for Florida removed that phrase from its Constitution in 1885, and it has never reappeared.[14] Although Florida inserted the "paramount" word in 1998, Florida inserted that word in a much weaker phrase — listing education as merely "**a** paramount duty".[15] In stark contrast, fully funding education is and always has been "**the** paramount duty" in Washington, which means having a rank that is "preeminent, supreme, and more important than all others."[16]

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[13] *CP 2902-2903 (FOF/COL ¶¶145-46).*
[14] *Art. VIII, §1, Fla. Const. (1868); Art. XII, §1, Fla. Const. (1885).*
[15] *Art. IX, §1, Fla. Const. (1998).*
[16] *CP 2907 (FOF/COL ¶161).*

The Institute's reference to the constitutional language of any other State is inapposite, as are any interpretations of other States' laws. No other State's Constitution mandates the paramount duty as Washington's does, and Washington law has long recognized this fact.

E. The trial court's ruling is unambiguous — this is an Article IX, §1 case

The Institute tries to characterize the trial court's ruling as a "conflated" ruling involving more than Article IX, §1. It asserts that this Court must also look to a separate obligation of the legislature "to provide for a general and uniform system of public schools" under Article IX, §2. Again, the Institute is mistaken. Simply reading the trial court's ruling makes it clear that it's a Article IX, §1 ruling. Article IX, §1 is clear, unambiguous and stands on its own. That is why both the Washington Supreme Court in 1978 and the trial court in 2010 held that the State must fully comply with Article IX, §1 as its first priority.[17]

III. CONCLUSION

The Institute clearly has strong beliefs about what it perceives to be the legality and propriety of the specific "parental choice" programs it has defended in other States across the country as being one of the ***means*** a State like Washington might consider in the future.

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[17] *Seattle School District v. State, 90 Wn.2d at 518; CP 2906 (FOF/COL ¶159).*

But the legality and propriety of such means under Washington law at some indeterminate day in the future is not an issue in this appeal.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.

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